U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 23May2002

CASE NO: 2001-LHC-1751

OWCP NO: 07-156586

IN THE MATTER OF

GREGORY D. TOWNSLEY,
Claimant,

v.

SOUTHLAND LABOR SERVICE, INC.,
Employer,

CHAILLAND, INC.,
Joined Employer,

and

HARTFORD ACCIDENT & INDEMNITY CO.,
Carrier

APPEARANCES:

BEN E. CLAYTON, ESQ.
On behalf of Claimant

NATHAN L. SCHRANTZ, ESQ.
On behalf of Joined Employer and Carrier

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Gregory D. Townsley (Claimant) against Southland Labor Service, Inc. (Employer), Chailland, Inc. (Chailland) and Chailland's insurer, Hartford Accident and Indemnity Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Metairie, Louisiana, on January 11, 2002. All parties were afforded a full opportunity to adduce testimony and offer documentary evidence.

I. BACKGROUND

Claimant suffered a heart attack while at work on May 8, 2000. He subsequently found suitable alternative employment after recovering. He seeks benefits for wages lost between the date of the injury and when he found his current position. Claimant brought suit against two employers. Despite adequate notice, Employer never appeared. On February 8, 2002, I issued a Decision and Order Approving Settlement between Claimant and Chailland and its insurer. This settlement paid $14,000 to Claimant and $4,000 attorney's fees in exchange for discharging all liability against Chailland and Carrier for benefits and medical treatment.

II. ISSUES

1. Jurisdiction
2. Responsible employer/employee-employer relationship
3. Causation
4. Nature and extent of disability
5. Average weekly wage

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a 48 year-old man from Marrero, Louisiana, who worked for Employer's labor contract division as a headhunter. His duties included headhunting, payroll and monitoring jobs. (TR.13,18). He explained that Joe Dantin, Employer's owner, also directed him to perform physical labor as needed. (TR.23). Claimant began working for Employer approximately 14 to 16 months prior to having a heart attack at work on May 8, 2000. (TR.19). He earned approximately $950 per week. (TR.19-20,45). Tax records show that he earned $47,178.26 in 1999. (CX.2, p.1-2).

Chailland is a subleasing company or payroll service used by Employer. (TR.40-41).

Contractors hire subleasing companies to provide workers' compensation coverage for projects. Claimant testified that they issue certificates to vendors stating that they are a contracting company's workers' compensation carrier. (TR.40). Generally, contracting companies buy their own general liability insurance. (TR.41). Sometimes, Claimant was paid by Chailland. Other times, he was paid by Employer. (TR.42). Chailland never provided supervisors for any of the jobs Claimant worked on or directed his work. (TR.43-44). When Claimant was paid by Chailland, taxes were taken out of the check and he received an IRS Form W-2 at the end of the year. (TR42, CX.2, p.1). Employer took no taxes out when it paid Claimant and sent him an IRS Form 1099-MISC at the end of the year. (TR.42, CX.2, p.2). These records indicate that Claimant was paid $26,378.26 by Employer and $20,800 by Chailland in 1999. (CX.2, p.1-2).

On May 8, 2000, Claimant had to perform physical work because most of the work crew did not appear for work. The job was on an aluminum boat in a rack placed on a dredge. (TR.20,22,24). The dredge was at the end of a dock in the New Orleans Industrial Canal. (TR.21). The Industrial Canal was heavily trafficked with boats of all sizes, including-ocean going and container vessels. (TR.22). This work involved lifting plank boards and bumper sections weighing up to 200 pounds in 90 degree weather. (TR.20,24).

Claimant weighed approximately 275 pounds on May 8, 2000, and approximately 245 pounds at the time of trial. (TR.25). He denied any health problems, including heart problems, prior to the May 8, 2000 heart attack. (TR.26).

Claimant began working at 6 a.m. on May 8, 2000, and began experiencing back pain around 10 a.m. (TR.27). He was sweating profusely. (TR.27-28). Claimant eventually left the job site to get some aspirin to treat back and side pain. When he returned to the boat he felt worse. Claimant had to sit down and a fan was provided. He was asked if his heart or arms hurt but denied such symptoms. Claimant and a worker closed the job site around 11:30 because of lack of workers. (TR.28). On the drive away from the job site, Claimant's condition worsened and he was taken to Charity Hospital in New Orleans. (TR.28-29).

As Claimant entered the hospital, he collapsed and could not breath. He was admitted from Monday to Thursday afternoon. (TR.29). While in hospital, an angiogram and angioplasty were performed. (TR.30; CX.1, p.2). A stent was also placed in an artery. (TR.30; CX.1, p.3).

Claimant went to see Dantin the day after he was discharged from the hospital. (TR.32). He then went to the job site to speak to the crew but did not do any work. (TR.33). When he returned to see Dantin the following Monday, Dantin offered to pay Claimant "a couple of hundred bucks a week" as salary because Claimant was not as useful as he had been previously. (TR.33-4). Claimant did not work for Employer thereafter. When Claimant called Chailland, they told him that they had been informed that he had quit on May 8, 2000. (TR.34).

The doctors released Claimant to return to work around December 15, 2000. (TR.34,46). Claimant initially had difficulty finding a job due to his medical condition. Lomco Contractors hired

him as a runner for $350 per week beginning around December 15, 2000. (TR.35, 46). This position involved no physical activity, since his physicians had prohibited him from performing physical work. (TR35). He worked in this position until he went to work for Bollinger, his current employer, on the day after Labor Day in September, 2001. (TR.15,36,47). Claimant now works as a recruiter. This position involves traveling to job fairs and recruiting workers for Bollinger. It involves no physical labor and pays a base salary of $960 per week. (TR.15,16).

Claimant continues heart treatment with Charity Hospital. He goes for check ups every five or six weeks. (TR.37). Since his heart attack, Claimant has lost almost 50 pounds in a health program. He also carries nitroglycerin at all times and takes aspirin daily as well as glucophage. (TR.38).

Medical Evidence

On May 8, 2000, Claimant arrived at Charity Hospital's emergency room with chest pain and a history of hypertension. An initial electrocardiogram showed broad, peaked T waves in the anterolateral distribution. There was some ST- segment elevation in that distribution suggestive of early acute myocardial infarction. Claimant was started on acute medical therapy and transferred to the catheterization laboratory where an emergency angiogram was performed by Dr. Hebert. (CX.6, p.9-10). The following day, Dr. Mendoza performed a coronary angioplasty and placed a stent in Claimant's left anterior descending artery. (CX.6, p.10-12).

On May 26, 2000, Dr. Mittal observed normal left ventricular function. (CX.6, p.13). On July 17, 2000, Dr. Breaux recommended that Claimant not return to his previous job and find a less strenuous position. The angioplasty and stent had been successful but there was still some coronary disease present at sites other than where the angioplasty had been performed. (CX.6, p.8).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 990 F.2d 730 (3rd Cir. 1993).

JURISDICTION

In order to successfully claim benefits under the Act a worker must satisfy both the "status" and the "situs" test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-416, 105 S.Ct. 1423 (1985). In other words, a worker must be "engaged in maritime employment," 33 U.S.C. § 902(3), and he must have been injured "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)," 33 U.S.C. §903(a). *See* Munguia v. Chevron U.S.A., Inc., 999 F.2d 808, 810 (5th Cir. 1993).

Based on Claimant's testimony, he suffered a heart attack while working on an aluminum boat that was situated in a rack on a dredge. The dredge was at the end of a dock in the New Orleans Industrial Canal. According to Claimant, this canal is heavily trafficked with boats of all sizes. I found Claimant to be a very credible witness. I find that the Industrial Canal is a navigable waterway and that Claimant was engaged in maritime work at the time of his heart attack. Therefore, Claimant satisfied both the status and the situs tests and this court has jurisdiction over the claim.

RESPONSIBLE EMPLOYER/EMPLOYER-EMPLOYEE RELATIONSHIP

Claimant has sued two entities as his employers in this case. One of these entities has settled with Claimant. Therefore, I must determine whether the remaining entity, Employer, is responsible for Claimant's claim under the Act. The Act does not define "employer" in terms of the types of entities that qualify. Instead, it defines the class of employees covered by the Act and then defines "employer" as "an employer any of whose employees" are covered by the Act.

"Employer" is currently defined as follows:

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). 33 U.S.C. § 902(4).

The Act does not limit the type of legal entity that can qualify as an employer. Given the intent of Congress to provide coverage to all persons within the statutory definition of employee, the conclusion is inescapable that any entity capable of employing a statutory "employee" can qualify as an employer, including partnerships and joint ventures. Davidson v. Enstar Corp., 848 F.2d 574, rev'd on other grounds, 860 F.2d 167 (5th Cir. 1988).

Though any legal entity can qualify as an employer, the existence of a master-servant relationship is a condition precedent to making a claim under the Act. See Corwell v. Bensen, 285 U.S. 22, 54 (1932). Legislative history shows that when Congress amended the Act in 1972, it had

> "no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment." H.R. Rep. No. 1441, 92d cong., 2d Sess. (1972), reprinted in 1972 U.S. Cong. & Admin. News 4698, 4708.

In Holmes v. Seafood Specialist Boat Works, the Board found that determining whether a claimant was in "an employee-employer relationship with employer... is necessary in order to exercise subject matter jurisdiction over a case." 14 BRBS 141, 147 (1981).

Self-employed independent contractors are not covered employees. It is well-settled that the basic feature of an independent contract is that it does not involve an employment relationship. Casement v. Brown, 148 U.S. 615, 622-623 (1983); See Cadillo v. Mockabee, 102 F.2d 620, 622 (D.C. Cir. 1939) ("Since in our opinion claimant was an independent contractor, he is not entitled to claim under the Compensation Act as an employee."); See also Noel v. Isbrandsten Co., 179 F.Supp. 325, 327 (E.D. Va. 1959), aff'd, 287 F.2d 783 (4th Cir.), cert. denied, 366 U.S. 974, 975 (1961) (holding that a marine surveyor was not covered by the Act because he was an independent contractor).

To determine whether an employer-employee relationship exists, the Fifth Circuit has applied the "relative nature of the work" test to claims pursuant to the Act. See Haynie v. Tideland Welding Service, 631 F.2d 1242 (5th Cir. 1980). This test requires a two part analysis, examining (1) the nature of the claimant's work, and (2) the relation of that work to the regular business of the employee. Id. at 1243. In evaluating the nature of a claimant's work, the fact-finder should consider the skill required to do the work, the degree to which the work constitutes a separate calling or enterprise, and the extent to which the work might be expected to carry its own accident burden. Carle v. Georgetown Builders, Inc., 19 BRBS 158 (1986). The factors relevant to analyzing the relationship between the claimant's work and the employer's business include whether the claimant's work is a regular part of the employer's regular work, whether the claimant's work is continuous or intermittent, and whether the duration of the claimant's work is sufficient to amount to the hiring of continuous services as distinguished from the contracting for the completion of a particular job. Id. at 161. In Oilfield Safety & Mach. Specialties v. Harman Unlimited, the Fifth Circuit reasoned that

the employer-employee test should be inclusive, so that any worker whose services from a regular and continuing part of a business is protected under the workers' compensation laws. 625 F.2d 1248 (5th Cir. 1980).

Claimant's tax records show Employer paid him as an independent contractor. However, I find that applying the "relative nature of the work" test to the facts of this case show that Claimant was Employer's employee under the Act. According to Claimant's testimony, he worked exclusively for Employer. He took directions solely from Employer. Several contract bids for maritime work were made on Employer's letterhead with Claimant's name on the signature line. (CX. 4). The fact that Employer contracted with Chailland to provide workers' compensation insurance coverage indicates that Claimant was not expected to carry his own accident burden. Claimant worked continuously and only for Employer. He received payments from Chailland for the job he was working on at the time of his injury. However, Chailland did not participate in directing the project. Claimant's work for Employer was continuously performed for enterprises taken on by Employer. Chailland was just a subleasing or payroll company that performed a small portion of work for Employer's enterprise. The document filed by Employer with the Louisiana Department of Labor concerning unemployment benefits would indicate that Employer may have considered Claimant an employee. (CX. 6, p. 16 "Gregory Townsley was not discharged, he resigned voluntarily"). Therefore, I find that an employee-employer relationship existed between Claimant and Employer at the time of Claimant's injury and that Employer is responsible under the Act.

CAUSATION

Section 20(a) of the Act provides Claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'dm 892 F.2d 173, 23 BRBS 13 (CRT)(2nd Cir. 1989). Once Claimant proves these elements, he has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326 (1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prime facie case, the burden shifts to Employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

An injury occurs when something unexpectedly goes wrong within the human frame. Wheatly v. Adler, 407 F.2d 307 (D.C. Cir. 1968). An external, unforeseen incident is not necessary; experiencing back pain or chest pain at work can be sufficient. Darnell v. Bell Helicopter Int'l, Inc., 16 BRBS 98 (1984).

I found Claimant to be a credible witness and I find that Claimant's unrebutted testimony would be sufficient to establish a prima facie case and grant Claimant the benefit of the Section 20(a) presumption. Claimant was performing heavy labor on May 8, 2000, carrying plank boards weighing

up to 200 pounds. He began to feel ill while working, though he did not believe it was heart related at the time. Claimant subsequently collapsed at the door to the hospital and was treated for a heart attack. The evidence is clear that Claimant suffered a heart attack on May 8, 2000, and that this was caused in whole or in part by his maritime employment.

Employer must produce substantial evidence to rebut the statutory presumption that "the claim comes within the provisions" of the Act. See 33 U.S.C. §920(a). That evidence must be "specific and comprehensive enough to sever the potential connection between the disability and the work environment." Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980), aff'g, 6 BRBS 607 (1977); Butler v. District Parking Management Co., 368 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301,305 (1989).

Employer has offered no evidence to rebut Claimant's testimony or the 20(a) presumption. I find that Claimant's disabling condition is causally related to his employment.

NATURE AND EXTENT

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of her disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement(MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 2741(1989); Trask, at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395 (1981). Claimant testified at trial that he was released to return to work around December 15, 2000, and agreed that to be the date of MMI. Employer has not objected. Therefore, I find that Claimant's condition reached MMI on December 15, 2000.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the LHWCA means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. §902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 117 S.Ct. 1953, 1955 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corps., 25 BRBS 128 (1991).

Though most of Claimant's duties for Employer did not involve heavy labor, he testified that he was expected to perform heavy duties when needed. This is what happened on May 8, 2000, the date of his heart attack. On July 17, 2000, Dr. Breaux recommended that Claimant not return to his previous employment. Therefore, I find that Claimant has established a prima facie case for total disability.

SUITABLE ALTERNATIVE EMPLOYMENT

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the Claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g, 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir 1993), cert denied, 114 S.Ct. 1539 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT)(4th Cir. 1984), rev'g, 13 BRBS 53 (1980); Turner, 661 F.2d at 1043, 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

I find the job offered by Dantin paying "a couple of hundred bucks a week" was not suitable alternative employment. Absolutely no details were provided as to the nature of the job. Employer has failed in its burden to show that Claimant could reasonably perform the job given his age, education, work experience and physical restrictions.

Claimant admits that he found suitable alternative employment. He testified that he worked for Lomco Contractors from December 15, 2000, until he began working for his current employer, Bollinger, on the day after Labor Day, 2001. He testified that he earned $350 per week at Lomco Contractors and now earns approximately $960 per week at Bollinger. Therefore, I find that suitable

alternative employment existed as of December 15, 2000. At that time, his wage earning capacity was $350 per week. On the day after Labor Day, 2001, Claimant's wage earning capacity was $960 per week.

AVERAGE WEEKLY WAGE

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Coorp., 24 BRBS 137 (1990); Orkney v. General Dynamics Corp., 8 BRBS 543 (1978); Barber v. Tri-State Terminals, 3 BRBS 244 (1976); aff'd sub nom. Tri-State Terminals v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is permanent and continuous. Duncan-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983). The computation of average annual earnings must be determined pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. §910. Section 10(a) applies where an employee "worked in the employment... whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. §910(a); Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135-136 (1990); Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to injury. Empire United Stevedores v. Gatlin, Id.; Duncan-Harrelson Co. v. Director, OWCP, Id.; Duncan v. Washington Metro. Area Transit Auth., Id.; Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979).

The record contains evidence of Claimant's total earnings in 1999. However, Claimant did not testify how many hours per week he worked or whether he received compensated vacation. When there is insufficient evidence in the record to make a determination of average weekly wage under subsections (a) or (b), subsection (c) is used. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), aff'd and remanding in part 1 BRBS 159 (1974); Sproull v. Setevedoring Servs. of America, 25 BRBS 100, 104 (1991); Lobus v. I.T.O. Corp., 24 BRBS 137 (1991); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981). Subsection (c) is also used whenever subsections (a) and (b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); Walker v. Washington Metro Area Transit Auth., 793 F.2d 319 (D.C. Cir. 1986), cert denied, 479 U.S. 1094 (1987); Browder v. Dillingham Ship Repair, 24 BRBS 216, 218 (1991). I find subsections (a) and (b) cannot be reasonably and fairly applied and that use of subsection (c) is appropriate in this case.

Section 10(c) of the Act provides:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee. 33 U.S.C. 910(c).

According to Claimant's tax records, he earned $47,178.26 in 1999. He testified at trial that he earned approximately $950 per week at the time of the accident. I found Claimant to be a credible witness and $950 is close to the $907.27 sum arrived at when his 1999 earnings are divided by 52 pursuant to Section 10(d) of the Act. Accordingly, I find Claimant's average weekly wage at the time of the accident was $950.

CREDIT

As stated previously, on February 8, 2002, I issued a Decision and Order Approving Settlement between Claimant and Chailland and its insurer. This settlement paid $14,000 to Claimant and $4,000 attorney's fees in exchange for discharging all liability against Chailland and Carrier for benefits and medical treatment.

I find Employer is not entitled to a credit for the settlement made by Chailland. Section 3(e) credit is applicable only to amounts previously received under other workers compensation laws or the Jones Act, not from previous recoveries under the Act. ITO Corporation v. Director, OWCP, 883 F.2d 422 (5th Cir. 1989). Section 14(j) credit is available only for advance payments of compensation (not settlements) made by the same employer. Alexander v. Director, OWCP, 273 F.3d 1267 (9th Cir. 2001). Section 33(f) is limited to situations in which the third party is potentially responsible to both the employee and the employer. Castorina v. Lykes Bros. Steamship Co., 21 BRBS 136 (1998). Lastly, the credit doctrine created by the Board as a limitation on the aggravation rule is not applicable.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1) Employer shall pay Claimant compensation for temporary total disability from May 8, 2000, to December 15, 2000, the date Claimant found suitable alternative employment, based on an average weekly wage of $950.00.

2) Employer shall pay Claimant compensation for permanent partial disability from December 15, 2000, to August 31, 2001, based on an average weekly wage of $950.00 and a wage earning capacity of $350.00 per week.

3) Employer shall pay all interest due on unpaid compensation as calculated by the District Director.

4) Employer shall provide Claimant with medical treatment as his injury may require pursuant to Section 7 of the Act. Employer shall also reimburse Claimant for any medical expenses resulting from his May 8, 2000 injury that he has paid for.

5) Counsel for Claimant, within 30 days of receipt of this Order, shall submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have 20 days to respond with objections thereto.

6) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

So ORDERED.

A
LARRY W. PRICE
Administrative Law Judge

LWP:bab